

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
COUNTY OF MARIN, CALIFORNIA)	File No. 0003190744
)	
Request for Waiver Pursuant to Section 337(c) of)	
the Communications Act of 1934, as Amended)	

ORDER

Adopted: May 4, 2011

Released: May 4, 2011

By the Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The County of Marin, California (Marin or the County) filed an application¹ for new facilities to use twelve frequencies designated for land mobile use under Part 22 of the Commission's rules for public safety purposes. Marin seeks waiver of Sections 20.9(a)(6) and 22.621 of the Commission's rules (and such other rule sections that may be necessary)² pursuant to Section 337(c) of the Communications Act of 1934, as amended (the Act),³ or in the alternative, pursuant to Section 1.925 of the Commission's rules.⁴ By this Order, we deny Marin's request for relief under Section 337(c) but grant it under Section 1.925, as conditioned herein.

II. BACKGROUND

2. *Marin's Waiver Request.* Marin County asserts that its proposed facilities on the requested frequencies "will be part of an existing integrated Public Safety Law Enforcement and Fire Service communications system in the 470-512 MHz band"⁵ The County submits that its Marin Emergency Radio Authority (MERA)⁶ will use the facilities "to alleviate frequency congestion in the greater San Francisco area and to provide for interoperability with other Public Safety radio systems in the area."⁷ Marin County adds that it "has extensive urban, suburban, and rural areas and is vulnerable to widespread forest and residential fires, earthquake damage, and landslides."⁸ Marin states that the County

¹ See File No. 0003190744 (filed Oct. 4, 2007, as amended Dec. 27, 2007 (attaching Petition (requesting waiver) and submitting amendment to the request) (Waiver Request); Jan. 22, 2009 (Amended Waiver Request) (attaching Amendment to Engineering Report (Amended Engineering Report))).

² 47 C.F.R. §§ 20.9(a)(6), 22.621. See Amended Waiver Request at 1-2. Additionally, on our own motion under Section 1.3 of the Commission's rules, we consider waiver relief of Section 22.623(b). 47 C.F.R. §§ 1.3, 22.623(b).

³ 47 U.S.C. § 337(c).

⁴ 47 C.F.R. § 1.925.

⁵ Waiver Request at 1-2.

⁶ File No. 0003190744, Attachment "MERA Pt.22 Ex 3," Letter from Robert T. Doyle, Sheriff, Marin County Sheriff's Office, to Chief, Policy Division, PSHSB, FCC (July 11, 2007) (Marin County Sheriff Letter).

⁷ Waiver Request at 1.

⁸ *Id.* at 2.

must also “assist in wilderness and water rescues,” and “provide essential police services to populated and unpopulated areas.”⁹ Marin’s application requests twelve frequencies in the 470-512 MHz UHF band: 482.2375, 485.2375, 485.0375, 485.0875, 485.1125, 485.2625, 485.2875, 491.0375, 491.0625, 491.1125, 491.1625, and 491.1875 MHz.¹⁰ Marin specifies that it will use frequencies, 482.2375 and 485.2375 MHz, “as a conventional mobile/mobile relay channel” and that it will use the remaining ten requested frequencies as “simplex frequencies” for either “low-power ‘on-scene’ or ‘tactical channels.’”¹¹ Because the requested frequencies are designated as channels for point-to-multipoint operations frequencies under Part 22,¹² the County requests a waiver of Sections 20.9(a)(6) and 22.621 of the Commission’s rules.¹³

3. Marin states that it found these frequencies after “extensive off-the-air monitoring and searches of the Commission’s ULS database.”¹⁴ Marin contends that the County’s professional staff and its engineering communications consultant coordinated with the appropriate service frequency coordinator, APCO, and found no suitable Public Safety Pool frequencies to satisfy all of the system operating parameters “available in the portions of the T-Band designated for [the] geographical area” in which Marin is located.¹⁵ In support, the County provides (i) an engineering report¹⁶ purporting to show the unavailability of Public Safety frequencies and (ii) a letter from the Northern California Association of Public-Safety Communications Officials-International, Inc. (APCO) frequency coordinator, submitting that “due to the expanded coverage from [the proposed] location,” there are no “available channels in the existing channel allotments for Public Safety Services . . . that . . . would not result in interference either to [Marin] or [another] licensee[.]”¹⁷ Marin also submits that the requested Part 22 frequencies “are unused” in the San Francisco area and that interference from its proposed operations on the requested frequencies, is unlikely, “because the frequencies are currently unassigned to any co-channel user in the San Francisco [area].”¹⁸

4. On April 3, 2008, the Public Safety and Homeland Security Bureau (Bureau) issued a Public Notice seeking comment on the application and waiver request.¹⁹ The Bureau also sought comment on whether the 700 MHz public safety band would provide a viable alternative, in light of the February 17, 2009 digital television transition date and the Commission’s actions in facilitating a

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See 47 C.F.R. § 22.621.

¹³ See 47 C.F.R. §§ 20.9(a)(6), 22.621. Section 20.9(a)(6) provides that these frequencies shall be regulated as a commercial mobile radio service. Section 22.621 sets forth frequencies, some of which are in the 470-512 MHz band, that are available for point-to-multipoint systems.

¹⁴ Waiver Request at 2.

¹⁵ *Id.*

¹⁶ See File No. 0003190744, attached Exhibit 1, “Engineering Report Additional T Band Channels for Marin County,” prepared by C.S.I. Telecommunications, with appendices listing the search results for each Public Safety spectrum band (Engineering Report).

¹⁷ See File No. 0003190744, attaching Exhibit 2, “MERA Pt22 Ex 2,” Letter from Art McDole, Northern California APCO Frequency Advisor, to Shelly Grant, Supervising Communications Technical Manager, Marin County (dated July 16, 2007) (APCO Frequency Coordinator Letter).

¹⁸ Waiver Request at 2-3.

¹⁹ See Public Safety and Homeland Security Bureau Seeks Comment on Request for Waiver Filed by the County of Marin, California to Operate A Public Safety Radio System Using UHF Part 22 Point-to-Multipoint Frequencies, *Public Notice*, 23 FCC Rcd 5633 (PSHSB 2008) (*Public Notice*).

nationwide, interoperable broadband public safety network.²⁰ We received one comment from APCO pertaining to the availability of the 700 MHz band.²¹

5. APCO states that “the 700 MHz band has never been viewed as a replacement for existing public safety spectrum allocations, and availability of 700 MHz spectrum should not in any way prevent public safety agencies licensed in VHF and UHF from obtaining additional channels to expand their operations in their existing bands when circumstances warrant.”²² APCO further states that the large embedded base of existing VHF and UHF public safety systems often require additional spectrum to fill coverage gaps, accommodate additional users, reduce interference, expand services areas, or improve interoperability.²³ In this regard, APCO states that “interoperability could suffer if few agencies move to 700 MHz while most remain at UHF.”²⁴ Next, APCO argues that the Commission’s recent actions to facilitate a 700 MHz band public safety broadband network will not address the immediate demand for narrowband voice capacity because such a network will take many years to deploy, and may never provide nationwide mission-critical voice communications.²⁵ APCO adds that the Commission’s consideration of waiver requests must take into account that “public safety agencies often have specific requirements for radio frequencies in their current spectrum bands that justify waivers of the Commission’s rules, notwithstanding the potential availability of channels in the new 700 MHz band.”²⁶

III. DISCUSSION

A. Section 337(c) of the Act Analysis

6. Section 337(c) of the Act provides that, in connection with an application by an “entity seeking to provide public safety service,” the Commission “shall waive any requirement of this Act or its regulations implementing this Act (other than its regulations regarding harmful interference) to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services . . .” if the Commission finds that: (i) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use; (ii) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission’s regulations; (iii) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made; (iv) the unassigned frequency was allocated for its present use not less than two years prior to the date on which the application is granted; and (v) granting such application is consistent with the public interest.²⁷

7. When considering requests under Section 337(c) of the Act, we must initially determine that the applicant is an “entity seeking to provide public safety services.”²⁸ The Act defines the term

²⁰ See *id.* at 2, *citing* Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229; Development of Operational, Technical and Spectrum Requirements for Meeting Federal State and Local Public Safety Communications Requirements through the Year 2010, WT Docket No. 96-86, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (*700 MHz Second Report and Order*).

²¹ See File No. 0003190744, Comments of APCO, dated April 21, 2008 (APCO Comments).

²² APCO Comments at 2.

²³ See *id.*

²⁴ *Id.* at 2-3.

²⁵ See *id.* at 3.

²⁶ *Id.*

²⁷ 47 U.S.C. § 337(c).

²⁸ 47 U.S.C. § 337(f).

“public safety services” as “services — (A) the sole or principal purpose of which is to protect the safety of life, health, or property; (B) that are provided — (i) by State or local government entities; or (ii) by non-government organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and (C) that are not made commercially available to the public by the provider.”²⁹ Marin County asserts that the requested frequencies will be used to support an existing integrated “Public Safety Law Enforcement and Fire Service” communications system in the 470-512 MHz band.³⁰ Marin adds that it “does not contemplate using the [requested] frequencies as a common carrier.”³¹ Based on the record in this case, we find that Marin County is an entity “seeking to provide public safety services” as required by Section 337(f) of the Act.³²

8. Next, we consider whether the County’s waiver request satisfies the specific showing requirements mandated by Section 337(c) of the Act. We note that an applicant’s failure to meet a single criterion of Section 337(c) of the Act constitutes sufficient cause for the Commission to deny a request for waiver.³³

9. *No other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use.* First, regarding Marin’s request, we examine the availability of public safety frequencies outside the 700 MHz band. The County initially provided an engineering report, stating that a frequency search was performed for the 30-50 MHz, 150-174 MHz, 450-470 MHz bands.³⁴ Marin’s engineering firm found “a number of unassigned public safety frequencies in [these] . . . bands”³⁵ but further found that “each unassigned frequency has adjacent channel assignments with emissions overlapping any proposed station[,]” resulting in “potential interference to existing adjacent channel stations.”³⁶ These findings sufficiently show that public safety spectrum in these bands was not immediately available.

10. In seeking comment, the Bureau found, however, that “the [engineering] report is unclear as to whether other public safety frequencies are immediately available in” the 764-776/794-806 MHz and 806-824/851-869 MHz bands.³⁷ Our review of the Amended Engineering Report supports a finding that Public Safety frequencies in the 800 MHz bands were also not immediately available for purposes of the first criterion under Section 337(c).³⁸

²⁹ *Id.*

³⁰ See Waiver Request at 1-2.

³¹ See Waiver Request, as amended Dec. 27, 2007, at 2.

³² We previously concluded that Marin is an entity that provides public safety services. See County of Marin, California, *Order*, 22 FCC Rcd 9165, 9167 ¶ 5 (PSHSB PD 2007) (*County of Marin*). We concur with this determination because the record concerning the instant waiver request does not show any facts to the contrary.

³³ See Township of Cinnaminson, New Jersey, *Order*, 22 FCC Rcd 4583, 4585 ¶ 6 (PSHSB 2007) (*Cinnaminson*), citing University of Southern California, *Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2984 ¶ 15 (WTB PSPWD 2001).

³⁴ See File No. 0003190744, attached Exhibit 1, Engineering Report, at 1.

³⁵ *Id.*

³⁶ *Id.* (referring to the Engineering Report, Appendices, A1, B1, and C1 for listings of adjacent channel licensees that would be affected).

³⁷ *Public Notice*, citing File No. 0003190744, Engineering Report at 2 (referring to Appendices E1, F1, G1, H1, and H2).

³⁸ See Amended Engineering Report, Appendix I. Cf. Engineering Report, Appendix G1 for 806-824 MHz; Appendix H1 for 851-860 MHz; Appendix H2 for 860-869 MHz.

11. Regarding the 700 MHz band, we find, however, that Marin has not sufficiently demonstrated that Public Safety spectrum was not “immediately available.” We recognize that at the time Marin was preparing to file its application, the availability of the 700 MHz spectrum was not in the immediate future in view of the initial prospective DTV transition deadline of February 17, 2009. While it may have been reasonable for Marin to exclude the availability of the 700 MHz band from its initial analysis, we must consider its application in light of recent developments. Since Marin first filed the instant application in October 2007, broadcasters have vacated the 700 MHz band as a result of the June 12, 2009 DTV transition. In addition, the Bureau has approved the Region 6 (Northern California) 700 MHz Regional Plan.³⁹ Accordingly, Section 337 compels us to consider the 700 MHz public safety channels to be immediately available and ready for assignment.⁴⁰ We therefore reject APCO’s arguments.⁴¹

12. We also reject Marin’s broad assertion that “it had already expended in excess of \$30 [million] on the present system . . . and cannot . . . afford to replace it with a new 700 MHz system.”⁴² The Commission has previously apprised Section 337 applicants that “the statute requires that there be no unassigned public safety spectrum, or not enough for the proposed public safety use, in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services.”⁴³ Consistent with the Commission’s position, the Bureau and the Wireless Telecommunications Bureau have rejected the argument that an applicant must only show either the unavailability of frequencies in its preferred public safety band or, conversely, the unsuitability of frequencies in other public safety bands, for purposes of satisfying Section 337(c) of the Act.⁴⁴ Thus, because Marin has not shown the unavailability of 700 MHz public safety frequencies by way of amendment to its pending application, we find that it has not satisfied subsection 337(c)(1)(A). Having made this finding, we need not address its arguments regarding the remaining four criteria under Section 337(c).⁴⁵

³⁹ See Public Safety and Homeland Security Bureau Approves Region 6 (Northern California Area) 700 MHz Regional Plan, *Public Notice*, WT Docket No. 02-378, 24 FCC Rcd 12915 (PSHSB 2009). The Region 6 (Northern California) 700 MHz regional planning area “includes forty-eight (48) counties in the state of California situated north of the northernmost borders of San Luis Obispo, Kern, and San Bernardino counties.” *Id.* at n.1. As it is located in the San Francisco urban area, Marin is one of the 48 counties. In view of the initial February 17, 2009 deadline for the DTV transition, the County’s Amended Waiver Request and Amended Engineering Report do not mention the Region 6 700 MHz Plan and the 700 MHz spectrum that this Plan makes available to the County.

⁴⁰ See, e.g., County of Los Angeles, California, *Order*, 23 FCC Rcd 18389, 18398 ¶ 19 (PSHSB 2008).

⁴¹ See APCO Comments at 2-3.

⁴² Amended Engineering Report at 1.

⁴³ In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 22709, 22769 ¶ 132 (2000) (*Balanced Budget Act Report and Order*) (footnotes omitted); see also H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 579-80 (1997) (“Conference Report”) (“spectrum must not be immediately available on a frequency already allocated to public safety services.”).

⁴⁴ See *County of Marin*, 22 FCC Rcd at 9167-68 ¶ 6; State of Ohio, *Memorandum Opinion and Order*, 17 FCC Rcd 439, 446-47 ¶ 15 (WTB PSPWD 2002) (*Ohio*); State of Tennessee Department of Transportation, *Order on Reconsideration*, 15 FCC Rcd 24645, 24648-49 ¶ 9 (WTB 2000) (*Tennessee DOT*).

⁴⁵ See, e.g., Hennepin County, *Order*, 14 FCC Rcd 19418 (WTB 1999) (having noted failure of Hennepin County to meet one of the criteria, the Wireless Telecommunications Bureau did not address remainder); New Hampshire Department of Transportation (NHDOT), *Memorandum Opinion and Order*, 14 FCC Rcd 19438, 19442 ¶ 8 (WTB 1999) (*New Hampshire DOT*) (after having determined that New Hampshire failed to demonstrate that no other spectrum allocated to public safety service was immediately available, Bureau noted that it “need not address whether NHDOT has submitted evidence that would allow us to make the other findings required by Section 337(c)(1) of the Act.”).

13. However, our finding that Marin County does not warrant waiver relief under Section 337 does not foreclose consideration of Marin County's alternative request for waiver relief pursuant to Section 1.925 of the Commission's rules.⁴⁶ Section 1.925 provides the Commission the necessary flexibility to achieve its statutory objective of safeguarding life and property by considering an applicant's request for waiver relief according to the standards that an applicant must meet under the rule.⁴⁷ From our review of the record in this case, we find that Marin County has provided us with sufficient information for us to consider whether waiver relief is justified under Section 1.925.

B. Section 1.925 Waiver Analysis

14. To obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;⁴⁸ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁴⁹ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.⁵⁰

15. *Public Safety Operation on Commercial Paging Control Frequencies (Rule Sections 20.9(a)(6) and 22.621)*. Marin County seeks a waiver of Sections 20.9(a)(6) and 22.621 to operate new public safety paging facilities on one frequency pair, which will be used as a conventional mobile/mobile relay channel, and ten simplex frequencies, which will be used as low-power "on scene" or "tactical" channels. The requested frequencies are UHF channels listed under Section 22.621 for point-to-multipoint operation in the San Francisco urban area.⁵¹ The underlying purpose of Section 22.621 is to reserve certain frequencies "for assignment to transmitters utilized within point-to-multipoint systems that support transmitters that provide public mobile service."⁵² Our review of the Commission's licensing records confirms Marin's assertion that the requested frequencies "are unused in the San Francisco area."⁵³ Specifically, we find that no Part 22 common carrier operations are licensed on the requested frequencies nor is an auction of the frequencies listed in Section 22.621 either imminent or pending.⁵⁴

16. While we have recognized that, as a matter of policy, the Commission would typically assign a point-to-multipoint channel listed under Section 22.621 to a Part 22 applicant if that channel was

⁴⁶ *Balanced Budget Act Report and Order*, 15 FCC Rcd at 22769 ¶ 132 n.366, citing 47 C.F.R. § 1.925. *See also* Letter to Alan S. Tilles, Esq., 22 FCC Rcd 13577, 13581 & n.30 (2007) (noting that "[i]n addition to the Section 337 process, [public safety] entities can also seek a conventional waiver under Section 1.925 of rules."); County of Ocean, New Jersey, *Order*, 24 FCC Rcd 11299, 11305 ¶ 16 (PSHSB PD 2009). *See also* Baldwin Fire District, New York, *Order*, 24 FCC Rcd 11857, 11864-65 ¶ 17 (PSHSB PD 2009).

⁴⁷ *See* 47 C.F.R. 1.925 (providing that "[t]he Commission *may* waive specific requirements of the rules upon its own motion or upon request") (emphasis added). *See* 47 C.F.R. § 1.925(b)(3)(i)-(ii) (setting forth the criteria).

⁴⁸ 47 C.F.R. § 1.925(b)(3)(i).

⁴⁹ 47 C.F.R. § 1.925(b)(3)(ii).

⁵⁰ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁵¹ 47 C.F.R. § 22.621.

⁵² *Id.*

⁵³ Waiver Request at 2.

⁵⁴ The Commission's Wireless Telecommunications Bureau has not announced an auction for Section 22.621 frequencies, unlike other Part 22 spectrum.

previously unoccupied in that urban area,⁵⁵ we find that, in the instant case, continuing to let the requested frequencies remain fallow is not in the public interest. We find that the public interest served by Marin's proposal for the unused frequencies, as further addressed below, entails substantial public safety benefits for preserving the life and property of the County's population that outweigh reserving the specific frequencies for Part 22 use.⁵⁶ Additionally, we find that Marin's proposed use will not create interference to co-channel or adjacent channel licensees. We concur with Marin's contention that "because the frequencies are currently unassigned to any co-channel user in the San Francisco [area], the potential for interference to existing co-channel users is nil."⁵⁷ Marin submits that "[p]ossible interference to adjacent-channel users is prevented by the use of narrow-band modulation on wide-band-spaced channels."⁵⁸ Based on the record, we find that Marin will not cause harmful interference to any Part 22 entities. We therefore conclude that the underlying purpose of Section 22.621 would not be served or would be frustrated by granting a waiver in the present case.

17. Section 20.9(a)(6) presumes that operations on the frequency pair and ten individual frequencies that Marin seeks are regulated as a commercial mobile radio service.⁵⁹ This regulatory structure is not applicable to or appropriate for operations by public safety licensees. Because we find that it is in the public interest to grant a waiver of Section 22.621 to Marin to use the requested frequencies for public safety purposes, we conclude that the underlying purpose of Section 20.9(a)(6) would not be served by its application to the present case.

18. We also find that the County needs a waiver of Rule Section 22.623(b) in order to operate on the requested frequencies.⁶⁰ This rule specifies system configuration requirements for paging control channels assigned pursuant to Part 22. These requirements include that the "channels may be assigned only individually (unpaired)" and that "[f]ixed relay transmitters are not authorized."⁶¹ Marin's proposal includes pairing two frequencies and using the pair for relay or repeater purposes. Since the County would not be operating a paging control channel, however, on either the requested frequency pair or the ten simplex frequencies that Marin proposes for tactical use, the underlying purpose of Section 22.623(b) would not be served or would be frustrated by application to the present case.⁶² We therefore waive Section 22.623(b) on our own motion.

19. *Public Interest.* In addition to finding that the relevant rules would not be undermined by a grant of the waiver request, our analysis under the first prong of the waiver standard requires a finding that grant of the waiver would be in the public interest.⁶³ We find it significant that granting the instant

⁵⁵ See County of Morris, New Jersey, *Order*, 24 FCC Rcd 12492, 12496-97 ¶ 13 n.51 (PSHSB PD 2009).

⁵⁶ See Gateway Telecom LLC, *Order*, 22 FCC Rcd 15789, 15795 ¶ 13 (2007) (finding that "no current licensee that would be negatively impacted by granting a waiver" and that "if a waiver is denied, . . . frequencies will lay fallow until the Commission makes the spectrum available through auctions or other means."). Cf. Fresno City and County Housing Authorities, *Order on Reconsideration*, 15 FCC Rcd 10998, 11001 ¶ 9 (WTB PSPWD 2000) (weighing the competing public interests and finding that waiver proponent did not demonstrate that the public interest in not allowing a channel temporarily to lie fallow outweighed the public interest in fairness of application process).

⁵⁷ Waiver Request at 3.

⁵⁸ Waiver Request at 3, referring to Engineering Report and APCO Frequency Coordinator's Letter.

⁵⁹ See 47 C.F.R. § 20.9(a)(6).

⁶⁰ See 47 C.F.R. § 22.623(b).

⁶¹ See *id.*

⁶² See *id.*

⁶³ See 47 C.F.R. § 1.925(b)(3)(i).

request would “provide for interoperability”⁶⁴ with governmental agencies within the County “as well as the agencies that surround [it].”⁶⁵ Furthermore, a grant will promote interoperability of the County’s system with neighboring jurisdictions, specifically, through the repeater pair providing the capability to connect to “the [San Francisco] Bay Area DOJ Connectivity Gateway” and for use as part of “the Golden Gate Bridge Interoperability Plan.”⁶⁶ Notwithstanding the availability of 700 MHz band spectrum, we find it in the public interest to grant use of the Part 22 point-to-multipoint frequencies to the County because Marin already has “an existing integrated Public Safety Law Enforcement and Fire Service communications system in the 470-512 MHz band.”⁶⁷ We agree with Marin that the additional UHF Part 22 spectrum best suits its needs to improve its public safety communications system. The Marin County Sheriff states that “[p]urchasing [the] repeater system will allow continuous use of the field equipment currently owned and operated by MERA system agencies.”⁶⁸

20. We also find that the proposed system would further the public interest by affording Marin’s public safety agencies and first responders with the necessary spectrum for tactical use to allow the County to respond more efficiently at on-scene emergencies. Specifically, provision of tactical channels for “on-scene low-power communications” would “facilitate incident-based localized communications . . . [without] impacting the main MERA system.”⁶⁹ With “[t]he frequency of more serious situations increasing[,] . . . [o]n-scene low-power . . . communications ensure[] that an incident occurring in one jurisdiction will not impact the main system servicing” others.⁷⁰ Such tactical communications will also improve interoperability “between different public safety disciplines responding to the same situation[,]” resulting, for example, in improved “coordination between police and fire units . . . at an incident.”⁷¹ We further find that Marin’s proposed use of the ten simplex channels will “improve ‘fireground’ communications,” providing the County’s many agencies with “reliable and consistent communications” to combat the “Urban Interface” fire problem that Marin faces.⁷² Moreover, use of the tactical channels will “improve operations . . . when the coverage of the trunked system is limited”⁷³ Indeed, Section 1 of the Act defines one of the Commission’s over-arching purposes as “promoting safety of life and property through the use of radio communication.”⁷⁴ We conclude that the public interest will be promoted by affording Marin County’s public safety community the necessary spectrum to enable it to protect the lives and property in its care.

21. In concluding that granting the waiver relief to Marin, as conditioned herein, is consistent with the public interest, we also observe that the Commission has begun examining ways to repurpose TV

⁶⁴ Waiver Request at 1.

⁶⁵ Marin County Sheriff Letter at 1. *See also id.* at 2-3.

⁶⁶ *Id.* at 3.

⁶⁷ Waiver Request at 2.

⁶⁸ Marin County Sheriff Letter at 2 (adding that it is “more cost-effective to place one repeater system into service than to provide additional mobile and hand-held equipment with each user on the current system.”). Also, “[m]aintenance costs and reliability” will be “more manageable” *Id.*

⁶⁹ *Id.* at 1.

⁷⁰ *Id.* at 4.

⁷¹ *Id.*

⁷² File No. 0003190744, Attachment “MERA Pt.22 Ex 4,” Letter from Kenneth Massuco, Fire Chief, Marin County Fire Department, to Chief, Policy Division, PSHSB, FCC (July 11, 2007).

⁷³ *Id.* at 1.

⁷⁴ 47 U.S.C. § 151.

bands, such as the 470-512 MHz band,⁷⁵ for flexible use, including commercial mobile broadband. For instance, the National Broadband Plan has recommended that the Commission consider freeing up spectrum for commercial broadband use by using such mechanisms as voluntary incentive auctions,⁷⁶ and the Commission has taken its first steps toward this possibility with allocation proposals that would accommodate such use.⁷⁷ While, at this time, we conclude that granting Marin waiver relief will not compromise the Commission's ability to act (and flexibility in acting) on the recommendations of the National Broadband Plan and related initiatives for repurposing part of the TV bands for flexible use, we note that our consideration of the public interest in analyzing waiver requests on a case-by-case basis requires that we carefully consider any action that would disrupt or hamper the Commission's ability to identify and maximize the use of available spectrum. As the Commission takes steps to further broadband spectrum initiatives, it is likely that additional waiver requests for public safety use of spectrum currently allocated for the TV broadcast service will have different and more significant effects on Commission plans for this spectrum, and that it will accordingly become much more difficult to conclude that such waivers would, on the whole, serve the public interest. We therefore strongly urge public safety entities contemplating future waivers for TV and other non-public safety spectrum to consider use of the 700 MHz band to promote such goals as nationwide interoperability, consistent with the public interest.

22. *Conditional Grant.* Based on our findings and review of the record, we conclude that the record demonstrates that the underlying purpose of Sections 20.9(a)(6), 22.621, and 22.623(b)(3) would not be served or would be frustrated by application to the instant case and that grant of the Waiver Request would be in the public interest. Therefore, pursuant to Section 1.925 of the Commission's rules, we waive Sections 20.9(a)(6), 22.621, and 22.623(b)(3), as conditioned below, so that Marin may use the requested Part 22 frequencies to significantly upgrade its public safety communication system. To provide the appropriate protection for licensees on frequencies under Section 22.621, we will condition the County's authorization and require Marin to take immediate steps to address and otherwise resolve any harmful interference experienced by any licensee authorized to use Part 22 frequencies.

IV. CONCLUSION

23. Based on the record before us, we conclude that, although Marin has not made the requisite showing under Section 337(c) of the Act for a waiver of the Commission's rules, it has made a sufficient showing for granting, as conditioned herein, its requested waiver under Section 1.925 of the Commission's rules. We find that Marin satisfies the criteria set forth under the first prong of Section 1.925 to warrant a waiver of Sections 20.9(a)(6), 22.621, and 22.623 to permit Marin to upgrade its public safety communications system and operate on twelve Part 22 frequencies in the 470-512 MHz band.

⁷⁵ The 470-512 MHz band segment in which Marin seeks to use Part 22 frequencies is one of five bands currently allocated principally to broadcast television under Part 73 of the rules. See 47 C.F.R. Part 73. Specifically, the 470-512 MHz band is allocated for fixed and land mobile services on a co-primary basis with broadcasting. See 47 C.F.R. § 2.106, footnote NG66.

⁷⁶ See FED. COMMUNICATIONS COMM'N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 88-93 (2010).

⁷⁷ See Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF, ET Docket No. 10-235, *Notice of Proposed Rulemaking*, 25 FCC Rcd 16498 (2010) (proposing, *inter alia*, to expand allocations for primary operations in TV bands to include fixed and mobile services, as one of the "preliminary steps to enable the repurposing of a portion of the UHF and VHF frequency bands that are currently used by the broadcast television service, which in later actions we expect to make available for flexible use by fixed and mobile wireless communications services, including mobile broadband.").

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 337(c), that the Request for Waiver as amended, associated with the File No. 0003190744, filed by the County of Marin, California IS DENIED to the extent that Marin County seeks relief under Section 337(c) of the Act.

25. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and to Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the Request for Waiver as amended, associated with File No. 0003190744, filed by Marin County, Montana, IS GRANTED, as conditioned herein.

26. IT IS FURTHER ORDERED that File No. 0003190744 SHALL BE PROCESSED in accordance with this *Order* and the Commission's rules.

27. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau